United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2016

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

GEORGE BIDERMAN, CHARLES S. LOWRY, MICHAEL FRY, ANNE FRY, W. DAVID ANDERSON, MYLES S. FREHM, NORMAN VALE, J. SALKELD RIDER, ALAN HALSTEAD, WARNER DANBY, KATHLEEN ELGIN, FREDERICK TAUSSIG, HELEN ELY, LORRIN C. MAWDSLEY, ROBERT SPENCER, PETER SHEPHERD and EMILY MARKS,

Plaintiffs-Appellants,

against

ROGERS C. B. MORTON, Secretary of Interior, GEORGE B. HARTZOG, JR., Director, National Park Service, CHESTER BAKER, Regional Director of Northeast Region, National Park Service, JERRY WAGERS, Superintendent, New York Group, National Park Service, JAMES W. GODBOLT, Superintendent, Fire Island National Seashore, National Park Service, PETER F. COHALAN, Islip Town Supervisor, CHARLES BARRAUD, Brookhaven Town Supervisor, ARTHUR SILSDORF, Mayor, Village of Ocean Beach, ROBERT S. WRIGHT, Mayor, Village of Saltaire, WILLIAM SCHERMERHORN, Chairman, Islip Board of Appeals, THOMAS ROMEO, Chairman, Brookhaven Board of Appeals, JOHN LUDLOW, Chairman, Saltaire Board of Appeals, BENJAMIN EPSTEIN, Chairman Ocean Beach Board of Appeals, CARLOS CRUZ, Director of Building Department, Islip, ALBERT CARNES, Director of Building Department, Brookhaven,.BRUCE KAHLER, Building Inspector, Saltaire, and EDWARD DATTNER, Building Inspector, Ocean Beach,

Defendants-Appellees.

Appeal From Interlocutory Order Denying a Preliminary Injunction of The United States District Court for the Eastern District Of New York

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2016

GEORGE BIDERMAN, et al.,

Plaintiffs-Appellants,

against

ROGERS C. B. MORTON, Secretary of the Interior, et al.,

Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

The argument of the federal defendants, when stripped to bare essentials, seems to be: they agree that the Fire Island National Seashore Act requires them to preserve the Seashore, that motor vehicle traffic is injurious to the Seashore and must be reduced to a

minimum, that an exact quantification of the injury being caused by motor vehicles will not be known until a Master Plan and Environmental Impact Statement are finished, so the damage being caused by motor vehicle traffic should be allowed to continue until the Master Plan and Environmental Impact Statement are ready.

The plaintiffs' position is simply that the irreparable injury caused by motor vehicles is well known and was established in this proceeding, the lack of exact data is the direct result of the wilful failure of the federal defendants to prepare an Environmental Impact Statement in the almost five years since NEPA was passed, and the Seashore Act and NEPA require that the motor vehicle damage to the Seashore be stopped until a proper Master Plan, promised since 1965, and an adequate Environmental Impact Statement, required since 1970, are prepared and their proposals put into effect. The federal defendants now claim these documents will be ready in January, 1975. Their failure to meet prior promises does not justify any confidence in this one (See p. 26 of Plaintiffs Brief). The federal defendants do not even hazard a guess concerning how long the review process will take or when concrete action

can be expected. In the interim, they are content to allow the Seashore to suffer continuing irreparable injury from motor vehicles.

Reply With Respect to the Facts

Plaintiffs Brief sought to show that the findings of the court below were clearly erroneous. The attempt by the federal defendants to support those findings merely seems to highlight their infirmity.

At pages 11-14 of their brief, the federal defendants seek to prove the effectiveness of their regulation of motor vehicles on the Seashore. All the record references are to the testimony of two young and inexperienced rangers -- one had 18 months service on the Seashore, the other less than a year. (See Plaintiffs Brief, pp. 34-35).

The federal defendants characterize their testimony as "the informed professional opinion of NPS personnel involved on a full time basis with motor vehicle enforcement" (p. 11). The record is clear that neither ranger is or was involved on "a full time basis" with motor vehicle enforcement (Ott, Tr. pp. 611-14; Johnson, Tr. 663-65). As for informed professional opinion,

the federal defendants were unable to find (or unwilling to call) a single witness from the vast bureaucracy of NPS who had served on the Seashore for a substantial number of years.

Of equal or greater importance, the federal defendants ignored, as did the court below, the written reports of well informed NPS professionals -- James Godbolt, Superintendent of the Seashore and Jackson Price, Special Assistant to the Director of NPS, who was assigned specifically to investigate motor vehicle use on the Seashore. The reports of these men are fully described at pp. 22-33 of Plaintiffs Brief and need not be repeated here. They show graphically the lack of effective motor vehicle enforcement and contradict the testimony of the young rangers. Ranger Ott conceded Superintendent Godbolt's superior knowledge of the Seashore (Ott, Tr. 625-26); and present personnel were spread "pretty thin" (Ott, Tr. p. 626).

Not only do the federal defendants ignore their own records, they seek to dismiss the testimony of long time residents (5 to 20 years) as "casual observations" (p. 11). The testimony of these long time residents (See pp. 15-17, 33-35 of Plaintiffs Brief) is far more detailed and based on much more experience with the Seashore than

that of Rangers Ott and Johnson.

The federal defendants attempt to inflate a one week survey in July, 1973 into a "crackdown" (p. 14). In the ten years since the creation of the Seashore and the eight years since the vehicle regulations became effective, the federal defendants have maintained a 24 hour check on the western end of the Seashore for only seven days and have never done so in the eastern end. This short survey done over a year ago is claimed to prove "that NPS enforcement efforts are proving successful" (p. 15, emphasis supplied). The use of the present tense in connection with that survey is at best ludicrous and at worst deceptive. This is especially true since Superintendent Godbolt in an affidavit sworn to in September, 1973, 2 months after the survey, filed in opposition to plaintiffs' original motion, recognized the need for "more restrictive vehicular regulations" to limit the number of vehicles traveling across federal lands and to minimize such travel. (See pp. 2-3 of Plaintiffs Brief and PX 22 referred to there).

The federal defendants further distort this survey by constructing percentages "not including turnbacks" -- those cars trying to get on the Seashore illegally. No

reasons are given for excluding these cars which were going ahead onto the Seashore before the survey and would do so when it stopped (See pp. 35-36 of Plaintiffs Brief).

At pages 13 and 14 of their brief, the federal defendants also inflate the importance of a 1 to 2 hour patrol made by Ranger Ott with counsel for the government (Ott, Tr. pp. 602,610). They neglect to mention that the patrol was conducted at a time when Islip Town police were enforcing their regulations at the west end of the Seashore (Ott, Tr. 610-11) which accounted for the lack of private vehicles on the beach.

The federal defendants constantly refer to the improving enforcement efforts on the Seashore, while ignoring the fact that presently the Seashore is in the off season, when enforcement is non-existent, and transgressions are at their worst (Biderman, Tr. 73). Indeed, in an attempt to bolster their argument that motor vehicle enforcement has improved, they find it necessary to misuse a statement made by plaintiffs' counsel (p. 10), a statement which not only was sarcastic, as recognized by Judge Dooling, Tr. at p. 665, but also referred only to the four day period when the "guidelines"

were put into effect. Those guidelines, which plaintiffs do not oppose, were revoked by the NPS on June 19. The NPS can hardly rely on that four day period to show improved motor vehicle enforcement in general when they, by their own action, revoked those enforcement attempts on June 19.

The federal defendants characterize the testimony of Dr. Coates and Mr. Schuberth as "sketchy data supporting the premise that motor vehicles are harmful to the Seashore" (pp. 15-16). As shown in Plaintiffs Brief, pp. 17-22, the evidence of irreparable injury is clear and uncontradicted. The lack of more data is solely the result of the wilful failure of the federal defendants to have complied with NEPA. A decent Environmental Impact Statement should have supplied this information long ago. See pp. 46-49 of Plaintiffs Brief.

The federal defendants even go so far as to raise the absurd, even frivolous, possibility that a 3,000-4,000 pound vehicle or larger transporting one or more persons somehow might do less environmental damage than those persons might do on foot, or that the extra ferry trips, if any, required to replace the several hundred cars and trucks that carry passengers and heavy freight

across the beaches, dunes and back dune areas somehow would have an impact on the Great South Bay whose environmental consequences might outweigh the present disastrous consequences of motor vehicle use, pp. 16, 26. While NEPA requires the consideration of alternatives, it does not require the total abdication of common sense.

The federal defendants also contrive a "confusion" between the observations of Kenneth Ruzyla in an article reporting on a 1971 study and the testimony of Ranger Ott, Federal Defendants Brief, p. 16. Dr. Coates, who supervised the Ruzyla study, testified that it was concerned only with a 1660-foot area of beach deliberately selected because no evidence of either foot or vehicle traffic existed (Tr. 299-300) and that the photograph on p. 221 of Government Exhibit A showed the study area as a pinpoint of about one-thousandth of an inch (Tr. 298). Yet the federal defendants characterize Ranger Ott's observation of a five-mile stretch of Fire Island as "this area," leaving the erroneous impression that it was the study area.

Finally, the federal defendants also imply that plaintiffs are only interested in protecting their own property by stating that "the Islip portion of the Seashore,

the area of the Seashore where plaintiffs have homes and are primarily concerned with," footnote, p. 12, is the focus of the complaint in this case. Plaintiffs Lowry, Elgin, Taussig, Ely, Mawdsley, Spencer and Shepherd all have homes not in Islip but in Brookhaven. Furthermore, Plaintiffs Biderman and Lowry each served two terms as Chairman of the Fire island National Seashore Advisory Commission by appointment of Secretaries of the Interior Stewart L. Udall and Defendant Rogers C. B. Morton, respectively, and even a cursory reading of their affidavits in this case should make it clear that their concerns arose primarily out of their official duties and observation of the failures of the NPS to implement the Seashore Act.

Reply to Legal Arguments

Having ignored NEPA for 5 years, the federal defendants now seek to use it as a shield to excuse their inexcusable violation of NEPA. They argue that since the Master Plan and the Environmental Impact Statement are in the offing, there is no federal activity at the present time which is covered by NEPA since it does not apply retroactively to the 1968 motor vehicle regulations and

the issuing of individual vehicle permits is not major federal action affecting the environment. Until that happy day when the Master Plan and an Environmental Impact Statement are prepared reviewed and put into effect, whenever that may be, motor vehicles can continue to destroy the Seashore.

NEPA was passed specifically to preserve the environment and the Seashore Act was passed specifically to preserve the Fire Island National Seashore. The failure of the federal defendants to comply with these acts can no longer be condoned.

At long last, the federal defendants concede that the Seashore is an interdependent whole which must be considered as an ecological unit (p. 17). Plaintiffs vigorously argued that position in their brief in the former appeal, pp. 19-21 of Plaintiffs Brief in No. 73-2842. The federal defendants admit that an Environmental Impact Statement is required in connection with the Master Plan and further admit that an Environmental Impact Statement would be required if they promulgated new motor vehicle regulations (p. 22). Nevertheless, they argue that because NEPA does not apply retroactively to the 1968 regulations and the issuance of individual vehicle permits is not

major federal action affecting the environment, the regulation of motor vehicles on the Seashore does not require an Environmental Impact Statement.

Taking the federal defendants' position to its logical conclusion, if they decide never to issue new motor vehicle regulations or decide never to issue a Master Plan they will never have to prepare an Environmental Impact Statement. NEPA could be avoided by the simple expedient of a permanent decision to do nothing. NEPA cannot be so easily disregarded and evaded.

Plaintiffs in 1972 began this case with the principal objective of obtaining an Environmental Impact Statement treating the Seashore as an ecological unit. Such an Environmental Impact Statement is required by NEPA but has never been prepared by the federal defendants. By issuing permits and by failing to enforce adequate regulations, the federal defendants have given "go ahead" permission to motor vehicles to enter upon the Seashore and cause irreparable injury. Giving this permission without an Environmental Impact Statement, whether such an Environmental Impact Statement considers the Seashore as a whole or is limited to the vehicle problem, is a

violation of NEPA and should be enjoined.

The federal defendants' argument that this is not major federal action exalts form over substance. They argue that promulgation of motor vehicle regulations would be federal action but regulating motor vehicle traffic is not. The regulations are designed presumably to regulate activity which affects the environment. The regulations themselves have no impact on the Seashore. Motor vehicles chewing up the beaches, dunes and back dune areas have the impact. The regulation and control of that activity by the federal defendants is major federal action affecting the environment. This is so whether or not new vehicle regulations are issued, or whether or not a Master Plan is prepared.

The position of the federal defendants is not only legally unsound, as shown below, but is contradicted by prior NPS actions on the Seashore itself. The federal defendants considered it necessary to draft a negative impact statement in connection with the construction of a visitor center at Watch Hill. See Opinion of Judge Dooling, dated February 6, 1973 denying motions to dismiss (p. B-16, Appendix B to Plaintiffs Brief in No. 73-2842).

In addition, when the community of Cherry Grove asked permission to drill a water well on federal land to augment its depleted supply, the federal defendants stated that "An environmental impact statement would also be required before a permit could be issued." (Exhibit 48 to the Cohn Affidavit, Record Document No. 53 in prior appeal No. 73-2842, a copy of which is attached hereto as Appendix A.)

Thus, in two situations where the effect of federal activity was much less severe than with respect to motor vehicles, the federal defendants had no trouble concluding that impact statements had to be considered or prepared. The federal activity of allowing large numbers of motor vehicles on the Seashore has far greater impact and cannot continue in the absence of an Environmental Impact Statement.

NEPA Applies to Ongoing Regulatory Duties

The federal defendants argue that NEPA does not apply to the regulation of motor vehicles, since the existing regulations were originally promulgated in 1968 (pp. 6, 19-21). They cite virtually the only three cases that imply that NEPA does not apply retroactively, p. 19,

and then note, only in passing, a portion of the much greater body of law holding that NEPA does apply "retroactively" in the sense that it applies to ongoing regulatory projects. Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971); Arlington Coalition on Transportation v. Volpe, 408 F.2d 1323 (4th Cir. 1972), cert. denied sub. nom., Frigote v. Arlington Coalition on Transportation, 409 U.S. 1000 (1973); Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164 at 1172-81 (6th Cir. 1972); Sierra Club v. Mason, 351 F. Supp. 419 (D. Conn. 1973); Lee v. Resor, 349 F. Supp. 389 at 394-95 (N.D. Fla. 1972); United States v. 247.37 Acres of Land, 1 E.L.R. 20513 (S.D. Ohio 1971); Note: Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline, 81 Yale L. J. 1592 at 1595-96 (1972).

Moreover, the position of the federal defendants that NEPA does not apply to them, since it is not retroactive, ignores their own directives. Pursuant to NEPA, the Secretary of Interior issued departmental directives regarding preparation of environmental statements, Department Manual, Part 516, Chapter 2, "Statement of

Environmental Impact." Such directives provide that all activities of the Department of Interior will be assessed for their environmental impact, including those "continuing major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to the effective date of the Act." §3.B. It is with extremely poor grace that the federal defendants, in the face of that directive, here try to argue the opposite. Like any agency, NPS is bound by its own rules, United States v. Heffner, 420 F.2d 809 at 811 (4th Cir. 1969); United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954).

Since NEPA was passed five years ago, the agency should have done something by now. In Harlem Valley Transportation Association v. Stafford, No. 685 (2d Cir., June 18, 1974), this Court affirmed the issuance of a temporary injunction in a case where the federal agency had attempted to amend its regulations in accordance with the mandate of NEPA, and failed. If a court may issue an injunction against an agency that tried, and failed, to comply with NEPA in its regulations, a fortiori, a court may enjoin an agency that has not even attempted to bring its regulations in compliance with NEPA.

Allowing Motor Vehicles on the Seashore is Major Federal Action

The federal defendants also argue that the issuance of permits, considered individually, is not a major federal action -- that only the amendment of regulations is a major federal action and, consequently, until they decide to amend the regulations, no impact statement is required (pp. 21-24).

First, the issuance of permits is covered by NEPA according to the Council on Environmental Quality. This is explicitly set forth in the "CEQ Interim Guidelines." 35 Fed. Reg. 7390 (April 30, 1970):

> "Actions Included. The following interim guidelines will be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement:
>
> (i) 'Actions' include but are not limited to: ... . (ii) Projects and continuing activities: Directly undertaken by Federal agencies; ... . Involving a Federal lease, permit, license, certificate or other entitlement for use ... ."

Those guidelines belie the claim of the federal defendants that only the promulgation of new regulations, and not the issuance of permits could be considered a "major federal action."

So does Scientists Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973) cited at page 24 of the Federal Defendants Brief. There, the Court held:

> "...Thus, there is 'Federal action' within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment. NEPA's impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. In each of these instances the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party - private or governmental - to take action affecting the environment..." (at pp. 1008-89).

The applicable criterion is not whether the issuance of each permit itself constitutes major federal action. Rather, the major federal action consists of the aggregate of actions and inactions, considered jointly, that allow motor vehicles to cause irreparable injury to the Seashore.

An argument similar to that of the federal defendants was raised, and rejected, by the court in Minnesota

Public Interest Research Group v. Butz, 358 F. Supp. 584 (D.C. Minn.), aff'd 6 E.R.C. 1694 (8th Cir. 1974). There the defendants argued "that the impact on the environment of each individual sale is insignificant... ." 358 F. Supp. at 621. The court rejected that position, saying that it was "persuaded by the plaintiffs' arguments" that "the cumulative effect of all the actions ... must be considered... ." Id. at 622. There the defendants argued that "the major policy decisions involved in regard to timber sales in the BWCA were reached prior to January 1, 1970, and that since that date the Forest Service has merely given effect to past determinations of policy," Id. at 621 -- virtually the identical argument the federal defendants made in this case. The court responded:

> "It is the Court's conclusion that the cumulative effect of the administrative actions taken since January 1, 1970 in regard to timber sales in the BWCA constitute major federal actions that have had and continue to have a significant effect on the human environment." (Id. at 622. Emphasis supplied.)

Consequently, the argument that the amending of regulations is the only "major federal action" involved in this case again begs the question of what constitutes major

federal action. As shown above, the "major federal action" is not the promulgation of new regulations, but issuing permits and allowing motor vehicles to cause irreparable injury to the Seashore. Even focusing on the regulations, the position of the federal defendants is untenable. As shown above, NEPA applies to ongoing projects, such as the administration of vehicular traffic pursuant to the regulations. The position of the federal defendants would subvert the purpose of NEPA and would allow the continuation of any policy ad infinitum, if the policy decision were made prior to January 1, 1970.

Finally, the federal defendants argue that, in issuing the requested injunctive relief, the status quo would be changed (p. 26). This is, in reality, the same argument in a new form: that, because the existing policy is one of granting permits, an injunction, which would change that policy, would be improper.

This totally ignores the purpose of injunctive relief in a NEPA case. An injunction is to preserve the environment by halting adverse, continuing projects. In Minnesota Public Interest Research Group v. Butz, supra, the court enjoined the logging of trees. Thus, it enjoined

the then-present policy of granting permits, as well as the logging of trees under previously issued permits. As that case clearly demonstrates, the "status quo" that is to be maintained until the appearance of an impact statement is the status quo of the environment, and not the status quo of the position of the federal agency. Since allowing vehicles to traverse Fire Island causes the Seashore irreparable injury, the granting of "go ahead" permission by the federal defendants should be enjoined until the federal defendants finally comply with the law.

The Cross-Appeal of the Intervenor Constitutional Rights Committee of Kismet Should be Dismissed.

The Kismet Intervenors cross-appeal from Judge Dooling's denial of their motion for an injunction against the federal defendants. Not only does their elaborate brief totally ignore the critical finding of Judge Dooling, but their entire claim against the federal defendants is not even properly in this case.

In denying the Intervenors' motion, Judge Dooling wrote:

> "The Greenbergs, the evidence is, did not acquiesce in but sought to prevent people from crossing the property, even

> barricading it at times. Repeated trespasses not acquiesced in but not prosecuted for the usual and obvious reasons could not amount to establishing a prescriptive case against the Greenbergs. Moreover, it would hardly confer a right to cross the United States Government reservation used as a lighthouse site. That appears to have been owned by the government for some 150 years. An equally long strip of Fire Island State Park lying between the government reservation and Lighthouse Shores is not, evidently, open to the prescription contention." (App. A, pp. 20-21. Emphasis supplied.)

The Intervenors conveniently fail to mention Judge Dooling's finding with respect to the lighthouse property. Indeed, their statement of the reasons on which "Judge Dooling grounded his denial" conspiciously omit any reference to the language quoted above. (Intervenors Brief, p. 5).

The law is clear that private individuals cannot get an easement against the government, Blash v. Sawl, 309 F. Supp. 909 (D. Wisc. 1967). Whatever the merits of the argument concerning the Greenberg property,* that

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* The Intervenors assert, Intervenors Brief, p. 10, that there was "but sketchy testimony from a witness" that the adverse use of the Greenberg property was ever contested. The testimony, as the record demonstrates however, is neither "sketchy" nor confined to "a witness." (See Wood, Tr. 537, 538, 540; Hodges, Tr. 733). Moreover, the Intervenors Brief itself admits the flagrant disregard of property right shown by these people who supposedly established an "easement" by casually asserting that the fence Mrs. Greenberg set up several times to halt motor vehicle traffic over her property "was promptly driven over." (Intervenors Brief, p. 10).

argument is irrelevant with respect to property already in the hands of the United States Government at the time the trespass occurred. Ignoring the critical finding by Judge Dooling, however, does not make the finding disappear; rather, it stands as mute testimony to the legal accuracy of that ground for the denial of the motion.

While ignoring Judge Dooling's finding, however, the Kismet Intervenors try to bootstrap this claim into one of constitutional importance (Intervenors Brief, pp. 12-18).* The constitutional claim is spurious. It could never be established without a showing, in the first instance, of a constitutional right to travel by motor vehicle. The constitution, of course, guarantees no such thing. See Shavers v. Kelley, CCH Auto Insurance Cases ¶8308 (Wayne Cir. Ct., May 30, 1974).**

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* "Intervenors sought a declaration that its members have a constitutional right to ingress and egress to and from their homes by motor vehicles." (Intervenors Brief, p. 3.)

** *** "There simply is no law that the Court has found that establishes the proposition that the fundamental right to travel includes the right to travel by automobile. Admittedly, there is necessity for the automobile in modern society. But this does not mean that the right to own and use one is a right protected by the Constitution as a fundamental right." at p. 14580.

Equally as important, Judge Dooling's denial of the Intervenors' motion should be upheld because they have no right to assert their independent and unrelated claims in plaintiffs' action. They cannot impose on this lawsuit whatever problems they may feel they have with the federal defendants concerning the issuance of permits to their members.*

Conclusion

The federal defendants are, and have been for five years, in clear violation of the statutory mandate

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* This was recognized by the Court below, as indicated in the interchange between plaintiffs' counsel and Judge Dooling:

> COHN: "Your Honor, this is, as I understand it, a hearing on our motion for a preliminary injunction under subsection (f) of our notice of motion filed in February of 1973.
>
> "I submit that this motion has nothing to do with the individual granting or denial of permits, and, therefore, this kind of request in this proceeding is irrelevant.
>
> "If Mr. Calica wants to start his own lawsuit with regard to individual granting or denial of permits, that is his business. But I don't think he ought to raise that in this proceeding."
>
> THE COURT: "Yes. I don't think that is the normal part of the proceeding, because your intervention is subject to the shape of the case as it is when you came in." (Tr. 454-55).

of NEPA. The question before this Court is simply whether the will of Congress can be so easily thwarted. The federal courts have the "power and authority" to preserve this "gem of an island" from further despoliation. The Court below was clearly wrong in denying the preliminary injunction.

Dated: New York, New York
October 10, 1974

Respectfully submitted,

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Of Counsel

COMMENTS ON CHERRY GROVE'S REQUEST FOR WATER:

All three requests are covered under "Water Rights" (RC 31 ET SEQ) in "Administrative Policies for Recreation Areas...."

Request No. 1 could be granted according to those policies. "Owners of Lands.....adjacent to recreation areas may be granted, by Special Use Permit, the privilege of installing pipelines..... to transport water across Federal lands administered by the Service when the water rights are either owned by the Permittee or another agency of Government."

Prior to granting such a permit, the National Park Service would have to prepare an Environmental Impact Statement. Since water is frequently a direct determinant of growth, the environmental consequences go far beyond the simple impact of excavation and visual intrusion.

Requests 2 and 3 come under more restrictive guidelines. "Owners of lands adjacent.....may be granted, by Special Use Permit, the privilege of developing sources of water on Federal lands....." when it " .....facilitates the Management Program of the Service or when no other reasonable source of water is available." We can not see how the well would facilitate our Management Program. What other water sources have been explored by Cherry Grove? They should not be granted permission merely because it would be inconvenient to drill a well elsewhere.

The statement that there is no land available in the Grove for the well and the pump house implies that the local Government is unwilling to appropriate existing land through purchase or condemnation because it might be inconvenient or expensive. That seems insufficient reason to allow them to drill on NPS land.

An Environmental Impact Statement would also be required before a permit could be issued. The comments above on water and growth would apply here also.

The requests also bear an uncomfortable resemblance to the issues raised in the current legal action. Granting a permit could put us in the position of becoming a direct contributor to further Environmental degradation in this Fire Island community. Would that prejudice our position in the current action? Only a solicitor could say.

SUMMARY:

On request 1 no Special Use Permit can be granted until an Environmental Impact Statement is prepared.

APPENDIX A

EXHIBIT 48

On request 2 and 3 no Special Use Permit should be granted until we are satisfied that Cherry Grove has ".....no other reasonable source of water." No Special Use Permit can be granted until an Environmental Impact Statement is prepared.

If possible, we should defer any action until the current legal questions on Fire Island are resolved.

J. Wayne.
3-27-73

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Paula Ortega, being duly sworn, deposes and says that she is an employee of the firm of Webster Sheffield Fleischmann Hitchcock & Brookfield, attorneys for plaintiffs-appellants herein. On May 10, 1974 she served the within Reply Brief of Plaintiffs-Appellants on the following attorneys at the addresses given by depositing a true copy of the same, enclosed in postpaid addressed wrappers, in depository of the United States Postal Service at Rockefeller Center, New York, New York 10020:

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Sworn to before me this
10th day of October, 1974.

Notary Public

AMALIA VARGAS
NOTARY PUBLIC, State of New York
No. 60-4500337
Qualified in Westchester County
Certificate filed in New York County
Commission expires March 30, 1975

1A